IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 87

TAMPA ELECTRIC COMPANY,
Petitioner,

v.

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. and WEST KENTUCKY COAL COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER TAMPA ELECTRIC COMPANY

WILLIAM C. CHANLER,
WINTHROP, STIMSON, PUTNAM & ROBERTS,
40 Wall Street,
New York 5, New York,
Attorney for Petitioner.

Of Counsel:
STEPHEN A. WEINER.

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Opinions Below

The majority and dissenting opinions of the United States Court of Appeals for the Sixth Circuit (R. 64-92), rendered on April 4, 1960, are officially reported at 276 F. 2d 766. The opinion of the United States District Court for the Middle District of Tennessee, Nashville Division (R. 44-56), rendered on November 18, 1958, is officially reported at 168 F. Supp. 456.

Jurisdiction

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 4, 1960. The

Petition for a Writ of Certiorari was filed on May 12, 1960, and was granted on June 27, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

Statute Involved

Section 3 of the Clayton Act; 15 U.S.C. § 14:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.

Questions Presented

1. Does a contract with a coal producer to furnish a defined and limited portion of the fuel requirements of a single plant of a single electric utility for a period of 20 years, which was economically necessary to and desired by both contracting parties at the time it was entered into, which embraced less than 1% of the coal marketed by the seller and its competitors, and which provided for the introduction of a new kind of fuel into a state monop-

olized by oil, come within the prohibition of Section 3 of the Clayton Act?

2. In any event, can a seller be heard to contend that it violated Section 3 of the Clayton Act in justification of its own repudiation of a contract which the purchaser wishes to enforce?

Statement of the Case

Facts

Since there is no dispute as to the facts, and they are clearly and succinctly set forth in the majority opinion below, we believe it would be a convenience to the Court if we adopt that statement as our own:

> "Appellant [petitioner] is an electric public utility serving the city of Tampa, Florida, and neighboring communities (R. 30).[1] The appellees [respondents] are engaged in mining and selling coal (R. 5, 19).
>
> "In 1954 appellant operated two integrated generating plants, both located on Tampa Bay, Florida, at which there were eleven generating units, all of which burned oil (R. 30). In that year, in order to meet the increasing demand for electric energy in its service area, appellant decided to expand its facilities and build a new and additional integrated generating station on Tampa Bay, to be known as the Francis J. Gannon Station, at which it was planned to ultimately install six generating units (R. 30).
>
> "The May 23, 1955, contract [the contract at bar] was for the purchase of coal for use at the Gannon Station. It was entered into between the appellant as the buyer and the Potter Towing Company, a Tennessee partnership of David K. Wilson and

1. All record references have been added by us to the Court's statement.

Justin Potter, as the seller (R. 7-13). Subsequent to the making of the contract, the interest of Wilson and Potter was transferred to the appellee Nashville Coal Co. and thereafter to the appellee Nashville Coal, Inc., which is a wholly owned subsidiary of the appellee West Kentucky Coal Company (R. 5). The West Kentucky Coal Company guaranteed the appellant in writing against any loss or damage arising out of nonperformance of the contract (R. 6, 14).

"The contract, after stating that the seller proposed to make available for sale to the buyer large quantities of coal from the West Kentucky field near Uniontown, Kentucky, and that the buyer desired to purchase certain coal for its use in its plant to be constructed near Tampa, upon the terms and conditions thereinafter set out (R. 7), provided as follows:

"'Seller agrees to provide and deliver on the dock or docks of the Buyer at Plant Gannon coal to supply the total requirements of fuel of the Buyer for the operation of its first two units to be installed at the Gannon Station and the Buyer agrees to accept and pay for such fuel as provided in Article 4 hereof, which fuel requirements shall not be less than 225,000 tons of coal per unit per year. It is further agreed that if during the first ten years of the term of this contract the Buyer constructs additional units in which coal is used as the fuel, it shall give the Seller notice thereof two years prior to the completion of such unit or units and upon completion of same the fuel requirements thereof shall be added to this contract and be furnished by the Seller and accepted by the Buyer. It is understood that the Buyer has the option to be exercised two years prior to completion of said unit or units of determining whether coal or some other fuel shall be used in same. It is anticipated that deliveries will start approximately

March, 1957 for the requirements of the first unit and that deliveries for the requirements of Unit #2 will begin when constructed' (R. 7-8).

It also provided,

"'The term of this agreement shall be for a period of twenty years from the first day of the month in which month first deliveries are made to the Buyer' (R. 12).

"The first unit of the Gannon plant commenced operation August 1, 1957; the second unit on October 29, 1958. The third unit, a coal burning unit, was under construction at the time this action was filed (R. 31).

"For the appellant to equip the Gannon Station to burn coal necessitated a capital expenditure of $3,000,000.00 more than if the fuel initially chosen had been oil (R. 32). To supply the appellant under this contract required a capital expenditure in excess of $7,500,000.00 by the appellees (R. 32).

"In April, 1957, just before the first coal was to be delivered under the contract, the appellees advised appellant that they would not perform under the contract, which they contended was illegal and unenforceable by either party (R. 20, 32). As a result, it has been necessary for appellant to purchase its coal requirements in the market at a price substantially higher than that provided for in the contract (R. 9-10, 27, 35).

"In making such arrangements it estimated that its coal requirements for its Gannon Station were approximately as follows:

Year 1958	350,000 tons
Year 1959	700,000 tons
Year 1960	700,000 tons
Year 1961	1,000,000 tons

'To increase as required to about 2,250,000 tons per year' (R. 27).

> "At the time the contract was entered into, coal accounted for less than 6% of the fuel consumed in the entire state of Florida. Every electric generating installation in peninsular Florida burned oil at that time (R. 30, 31). It was estimated by the buyer that within a very few years the Gannon Station would consume more coal than was presently consumed in the entire state of Florida (R. 27). Peninsular Florida's coal consumption was approximately 700,000 tons per year." (Reprinted from R. 65-67.)

Two further facts should be noted. First, it was conceded by respondents in the Courts below that Potter Towing Company, the original contractor, was but one of some 700 coal producers who were not only able but "eager" to sell coal to petitioner, and had no such economic leverage vis-a-vis petitioner as to enable it to insist upon the "requirements" provision against petitioner's wishes (R. 43). That provision was instead motivated by the legitimate business needs of both the contracting parties, who together spent over $10,000,000 in preparation for the performance of the contract (R. 32).

Secondly, it should be pointed out that after the first unit at Gannon Station went into operation and during the pendency of this lawsuit, Peabody Coal Company, one of respondents' leading competitors, offered to supply coal for use in two units of petitioner's oil burning plants if petitioner would convert them to the use of coal, and that as a result of this offer petitioner's oil supplier reduced its price (R. 31, 33, 42).

The Lawsuit

Petitioner, on September 3, 1957, commenced an action in the United States District Court for the Middle District

of Tennessee, Nashville Division, for a declaratory judgment that the contract of May 23, 1955 was valid and enforceable (R. 4). In their answer respondents admitted the execution of the contract and the repudiation of their obligations thereunder, but alleged that the contract was void and unenforceable on the ground that it violated Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act (R. 19). Respondents then filed a motion for summary judgment (R. 23), and petitioner filed a cross-motion seeking the same relief (R. 28). District Judge William E. Miller granted respondents' motion for summary judgment, and denied petitioner's cross-motion, on the ground that the material facts were not in dispute and established the illegality of the contract under Section 3 of the Clayton Act (R. 44). The Court thereupon entered judgment declaring the contract illegal, void and unenforceable (R. 56). Petitioner appealed to the United States Court of Appeals for the Sixth Circuit (R. 59).

Decision Below

The majority of the Court below sustained the District Court, holding that the contract violated Section 3 of the Act and was therefore unlawful and unenforceable by either the buyer or the seller. As we read the opinion, the Court based its decision solely on the facts that the contract used the word "requirements" and that the quantity of coal involved in the contract would soon exceed the total amount of coal presently being sold in the state of Florida, and amounted in dollar value, over the life of the contract, to over $128,000,000. Accordingly, citing this Court's decision in *Standard Oil Co. of California* v. *United States*, 337 U. S. 293 (1949) (*"Standard Oil"*), the Court held that the amount involved in the contract

was "not insignificant or insubstantial" and that the contract was therefore void (R. 72).

The Court dismissed the contention that it was plain from the legislative history of the Act that it was intended to apply only to practices whereby powerful sellers imposed exclusive dealing or "tying" conditions upon a substantial number of buyers for the purpose and with the effect of pre-empting a substantial portion of the market for the goods which they sold, on the ground that the Act in unambiguous terms referred to "a" contract of sale for "use, consumption or resale" and that this Court had held in *Standard Oil* that the Act was "applicable to a situation where the seller did not occupy a dominant economic position in the industry" (R. 68, 69).

Again citing *Standard Oil*, the Court held that it was immaterial that the contract contained no condition that the purchaser would not deal in the goods of the seller's competitors, since the contract did require the seller to supply the buyer's "'total requirements' for the first two coal burning units and for such other units at the Gannon Station as would be constructed as coal burning units" (R. 69). The Court dismissed as immaterial the fact that under the contract the purchaser could, and in fact did, purchase oil, concededly a "competitive" fuel, on the ground that oil and coal are "separate defined subdivision[s] of the fuel industry generally" (R. 71). Similarly, the Court disregarded the allegedly "remote" possibility that the buyer might convert some of its oil burning units and purchase coal for these units from the seller's competitors, since "there is nothing to indicate that there is any planned or probable conversion" (R. 71). Finally, citing this Court's opinion in *Kelly* v. *Kosuga*, 358 U. S. 516 (1959), the Court held that since

the contract was void, the Court "will not assist either party in its enforcement" (R. 74).

In his carefully reasoned, and, we submit, completely sound dissent, Judge Weick took issue with the majority on each and every point (R. 74-92).

Summary of Argument

In several respects the Court below erroneously applied Section 3 to a family of contracts which the Act has never been held to govern in the 45 years since its enactment.

The Court's initial error was to rule that Section 3 invalidated a contract for the sale of a limited and defined portion of a buyer's total requirements of a product. The Act does not make "requirements" contracts as such illegal. A contract falls within the statutory language only if it can be said to contain a condition, agreement or understanding that the buyer will not use the goods of the seller's competitors. The contract at bar contains no such condition, agreement or understanding; there is not a word suggesting that petitioner may not deal in competing goods. Moreover, since the contract covers only the coal required by the first two units of Gannon Station and such of the remaining four units as petitioner elects to construct as coal burning during the first half of the contract term, petitioner is free to burn coal purchased from respondents' competitors in any unit thereafter constructed at that station. Even as to units at Gannon Station supplied by respondents themselves, petitioner may, under the contract, elect to purchase 15% of the required fuel from other designated sources. Petitioner is also free to burn coal purchased from respondents' competitors in any of the eleven units of its two other integrated power-producing plants, presently oil burning, which it may

elect to convert to coal, as well as in any new plant which it may determine to construct. Finally, oil, concededly a competitive fuel with coal, is presently being used at petitioner's two other plants and, under the terms of the contract, may even be burned in four of the six units at Gannon Station itself. Thus as petitioner can deal and is dealing in the goods of respondents' competitors, the contract cannot be deemed based on the condition, agreement or understanding that it will not do so.

The Court compounded this error by refusing to consider the statutory history of Section 3, which conclusively demonstrates that the Act was not intended to outlaw a single contract for the supply of part of a consumer's requirements, negotiated at arm's length with a seller who concededly lacked the economic leverage necessary to impose any exclusive dealing condition on the buyer. In terms of the language of Section 3 itself, such a contract cannot be deemed based "on the condition" that the buyer "shall not" use the goods of the seller's competitors, nor does a contract with a single consumer such as petitioner "substantially lessen competition" in a market, which was the concern of Congress in enacting the statute.

The result reached by the Court below is inconsistent with the holding of every previous case applying Section 3, since no court has ever invalidated contracts under this statute except where they exemplified the very elements which Congress had regarded as objectionable when it adopted the Act, namely, economic leverage by the seller coupled with a practice of tying up a substantial segment of the market for the seller's goods.

Not only do the language and legislative history of Section 3, as well as the relevant case law, militate against the conclusion of the Court below, but also the decision flouts economic realities. Coal, the subject matter of the contract at bar, is one of the most competitive products

in the country, and petitioner is only one of the innumerable users, actual and potential, which constitute the market available to respondents and their competitors. Indeed, as is conceded by respondents, there are 700 coal producers ready, willing and able to sell to petitioner, and the maximum amount of coal covered by the contract at bar represents less than 1% of the coal marketed by these producers. In terms of the market for all competitive fuels, the portion served by this contract becomes even more insignificant. The Court below ignored these facts because it refused to define the relevant market, even though this Court has held that whether or not a substantial lessening of competition occurs can only be judged in the framework of such a market.

In addition, the undisputed facts establish that the contract at bar effectively created competition by introducing into Florida a fuel to compete with oil, which had long enjoyed a virtual monopoly of the fuel business of that State. Indeed, as a result of the initial use of coal by petitioner, its oil supplier, previously unchallenged, has been compelled to reduce its price to meet actual offers by one of respondents' competitors to supply coal to petitioner. To hold, as did the Court below, that the contract at bar substantially lessened competition under such circumstances is factually untenable.

The grave damage to the economic life of this country flowing from the decision below is readily apparent. The holding of the Court outlaws every contract for the supply of the requirements of a single consumer (or even the requirements of a single consumption unit of a single consumer), provided only that such requirements amount to a "substantial" volume of goods. As this Court has recognized in other contexts, such requirements contracts are frequently economic necessities where, as in the instant

case, large expenditures are made by the contracting parties on the basis of a commitment to supply the buyer's long-term needs for a commodity at a designated price. This is especially true in the case of public utilities such as petitioner, which are under an obligation to render continuous service to the public at rates fixed by governmental agencies, and thus have especial need for the assurance of a continuous supply of raw materials at a price governed by contract. There are probably thousands of contracts in existence similar to that at bar and there is no justification for invalidating them, since by their very nature they entail none of the evils which concerned Congress when it adopted Section 3.

Finally, as Section 3 was enacted for the protection of buyers as a class from coercive sellers, by its very terms is directed solely at the seller, and does not declare unlawful a contract containing an exclusive dealing condition, there is no basis for holding that a seller can invoke its own unlawful act under Section 3 as an excuse for avoiding its contractual obligations, where the buyer desires performance. To hold otherwise would not only be inconsistent with prior judicial interpretation of Section 3, but would ignore the doctrine firmly established by this Court that remedies not expressly authorized by Congress will not be judicially added to the antitrust laws.

ARGUMENT

I

Since the contract at bar covers only a limited and defined portion of the buyer's requirements and does not prohibit the buyer from dealing in the goods of the seller's competitors either in terms or in effect, it does not come within the purview of Section 3 of the Clayton Act at all.

As is clear on its face, and is conceded by the majority below, the contract at bar does not contain any "condition, agreement, or understanding" that the buyer will not use or deal in the goods of the seller's competitors. Yet such a condition is the gravamen of the Act. If the buyer is not prohibited by the contract from dealing in the goods of the seller's competitors, there can be no violation of Section 3.

The majority below contends, however, that the absence of such a condition is immaterial here, since the contract has the equivalent of such a condition in that it covers the buyer's " 'total requirements' for the first two coal burning units and for such other units at the Gannon Station as would be constructed as coal burning units" within the first ten years of the contract term (R. 69).

We submit that this proposition is manifestly untenable. For concededly the buyer is free at all times to buy coal, oil or any other fuel from the seller's competitors for use in any of the 11 presently oil burning units at the buyer's two other integrated stations on Tampa Bay, or in any new plant it may elect to construct. Furthermore, if the demands for additional electricity require the buyer to construct additional units at Gannon Station itself, the buyer is free to burn oil, gas or any other competitive

fuel in such units. It is only if the buyer determines to construct additional coal burning units at Gannon during the first half of the contract term that it is obligated to purchase its additional coal requirements from respondents. After this ten year period, the buyer is free to purchase coal from the seller's competitors even for use in any additional coal burning units constructed at Gannon. Moreover, the buyer may even purchase from other sources 15% of the requirements of the coal burning units at Gannon supplied by respondents, provided it uses some by-product as a fuel furnished by one of its local customers (R. 8).

The majority below sought to meet these incontrovertible facts first by asserting that there was no present plan for the conversion of any oil burning units to coal, and that therefore the exercise of petitioner's right to purchase coal from the seller's competitors for such units was so "remote" as to be "immaterial" (R. 71). The significance of this assertion escapes us. Since the buyer has the right to deal in the goods of the seller's competitors, the contract cannot be based upon the condition that it will not do so. It is irrelevant whether the buyer has any present plans to exercise that right.

But in any event, the record affirmatively discloses that since the commencement of this very litigation, Peabody Coal Company, one of respondents' coal producing competitors, offered to furnish coal for two of petitioner's oil burning units if petitioner would convert them to coal, and that such offer was seriously considered by petitioner (R. 31, 33-41, 42). The obvious reason why this offer was not accepted is that petitioner's oil supplier promptly reduced the price of oil so as to meet this threat of competition (R. 42). Thus, as Judge Weick pointed out in his dissent, "such possible conversion is not as remote

as was claimed" (R. 82). It is clear therefore that the contract, far from foreclosing the seller's competitors, engendered active competition among them for the buyer's trade.

Secondly, although conceding that "coal and oil are competitive fuels",[2] the Court below concluded that "for the purposes of Section 3 • • • each is to be treated as a separate, defined subdivision of the fuel industry generally" (R. 71). Accordingly, as the present contract deals only with coal, the Court held it was "irrelevant" that the buyer could purchase oil for its oil burning units (R. 71). We respectfully submit that this is a complete *non sequitur*. The fact that the contract covers only coal certainly does not show that it is based upon the condition that the buyer will not deal in the goods of the seller's competitors, when the buyer is concededly free to deal in competitive fuels. The buyer is engaged in producing electricity for resale to the public at three integrated plants situated on the periphery of Tampa Bay. Since it is free to burn oil, gas or coal in any of these integrated units, the contract clearly does not prevent it from dealing in the goods of the seller's competitors.[3]

Thus, the present contract is totally different from the requirements contracts held unlawful by this Court in

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2. Such a conclusion would seem compelled by this Court's holding in *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63, 72 (1935), that "we take judicial notice of the fact that gas is in competition with other forms of fuel, such as oil and electricity."

3. In any event, as pointed out by Judge Weick (R. 83-87), it is plain from this Court's recent decisions, particularly *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956) (the so-called "cellophane case") that where, as here, we are dealing with commodities "reasonably interchangeable" for use as boiler fuel, coal cannot "be treated as a separate, defined subdivision of the fuel industry generally."

Standard Oil, on which the majority below relies. There, the filling stations were required to purchase *all* their requirements of gasoline from the seller, however much their requirements might increase in the future. As this Court pointed out, "• • • the very existence of such contracts denies dealers opportunity to deal in the products of competing suppliers and excludes suppliers from access to the outlets controlled by those dealers" (337 U. S. at 298). Here, on the contrary, as the buyer's demands increase, the buyer is free at all times to determine whether to purchase additional coal under the contract or whether to purchase other fuels from the seller's competitors, and, of course, it can currently purchase coal (if that be the relevant "subdivision of the fuel industry") from the seller's competitors for use in any of its other integrated plants existing or built in the future.

Under these circumstances, we submit that the present contract more closely resembles a contract for a fixed quantity than the type of "requirements contract" held unlawful by this Court in *Standard Oil*. Indeed, we think this is apparent from a mere reading of the attempt of the majority below to meet this contention:

> "There is also an important difference between a 'requirements' contract and a contract which calls for the purchase of a definite quantity over a period of time which the buyer estimates to be sufficient to meet his requirements. As pointed out in *United States* v. *Standard Oil Co.*, 78 F. Supp. 850, 867, S. D. Cal., when a dealer agrees to take a specific amount of a product, there is a likelihood that he may, by reason of unexpected shortages or increased demands, use competitive products, and competitors thus will have the opportunity of putting their products into competitive use by the buyer, with the ultimate result of inducing the buyer to handle their products. Under a 'requirements' contract for a long period of time this chance is, for all

> practical purposes, cut off. As stated by the Supreme Court in *Standard Oil Co. of California* v. *United States*, supra, 337 U. S. 293, 314, 'It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage, • • •' " (R. 70).

Even though we should agree with this statement, we are in total disagreement with the Court's apparent view that it supports its thesis that the contract at bar is similar to the requirements contracts held unlawful in *Standard Oil*. On the contrary, it seems to us to prove exactly the opposite. For, as we have seen, the more the demands for electricity on petitioner increase, or the lower the price of coal compared to the price of oil, the freer petitioner is to purchase coal (or other fuels) from the seller's competitors. Thus this contract lacks the very element which made the requirements contracts in *Standard Oil* equivalent to straight exclusive dealing contracts.

In its opinion in the *Standard Oil* case, this Court expressly recognized the difference between a requirements contract applying only to a limited number of units, and one covering the purchaser's entire demands for a product. Thus the Court contrasted the facts in *Standard Oil* with those in *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463 (1923), where it had held legal under Section 3 an arrangement whereby a number of refiners and wholesalers of gasoline leased tanks and pumps to retail dealers, on condition that the equipment be used only for dispensing gasoline supplied by the lessor:[4]

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4. This Court reasoned in *Sinclair* that "there is no covenant in the present contract which obligates the lessee not to sell the goods of another; and its language cannot be so construed. • • • The lessee is free to buy wherever he chooses; he may freely accept and use as many pumps as he wishes and may discontinue any or all of them" (261 U. S. at 474).

> "The present case differs of course [from the *Sinclair* case] in the fact that a dealer who has entered into a requirements contract with Standard cannot consistently with that contract sell the petroleum products of a competitor of Standard's no matter how many pumps he has * * *" (337 U. S. at 303-04).

This Court further noted:

> "* * * there is marked difference between a contract which confines an entire retail outlet to the use of a single brand and a contract which merely confines the use of a dispensing mechanism to a single brand: service-station sites, and therefore retail outlets, are limited in number; the number of pumps [or power plants] which a dealer may choose to set up is not * * *" (337 U. S. at 304, n. 6).

The purpose and effect of the "requirements" provision in the contract at bar is not to prevent the buyer from dealing with the seller's competitors, as it was in the contracts before the Court in *Standard Oil*. Its purpose and effect is simply to provide for the fact that it is impossible to predict in advance the precise amount of coal which a given unit will burn. For this depends both on the capacity of the unit and on the demand for its utilization. It may be noted that in the instant case the record affirmatively shows: (1) because of the demand for power in the area petitioner serves, the units already constructed at Gannon Station are in continuous operation, and (2) each of the units planned for Gannon Station has a known generating capacity, which requires a quantity of fuel ascertainable in advance to within approximately 5% (R. 31). On this basis the "requirements" of each unit of Gannon Station, as specified in the contract at bar, can easily be translated into an approximate number of tons, thus demonstrating that, for all practical pur-

poses, the contract is identical with a contract for a fixed amount (which concededly does not come within Section 3) rather than with a full requirements contract such as those involved in *Standard Oil*. To hold the contract illegal under Section 3 merely because the parties used the term "requirements" is to permit semantics to govern the application of the antitrust laws.

It is equally clear that illegality cannot be predicated upon the fact that the contract forecloses competitors of the seller from supplying Gannon Station with a reasonably ascertainable number of tons of coal over a period of years, even if that tonnage were deemed "substantial." Every contract for the purchase of goods, whether it be for the purchase of a dozen eggs or a billion tons of coal, excludes the seller's competitors from selling the same goods to the same purchaser. But there is nothing unlawful in that. As Mr. Justice Brandeis remarked in a leading antitrust case:

> "• • • the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." *Board of Trade of Chicago* v. *United States*, 246 U. S. 231, 238 (1918).

We submit it is incontrovertible that the present contract is not a "contract for sale • • • on the condition, agreement, or understanding that the • • • purchaser thereof shall not use or deal in the goods • • • of a competitor or competitors of the • • • seller," and therefore does not contain the essential characteristic at which Section 3 is directed. Without such a "condition, agreement, or understanding," there can be no violation of the Act.

In our opinion this alone conclusively disposes of the instant case.

II

Even if the contract had contained an "exclusive dealing" condition, it would not have violated the Act, because a contract for the supply of the requirements of a single consumer, which was economically necessary for and desired by both buyer and seller, does not come within the purpose and intent of Section 3 as expressed either by Congress in enacting or by the courts in construing it.

As we have seen, the Court below concluded that the contract at bar in effect contained an exclusive dealing condition and therefore violated Section 3 simply because it covered a portion of the buyer's coal requirements which the Court considered to be "not insubstantial." The inevitable conclusion from that proposition is that any contract for the purchase of a substantial quantity of goods is illegal. We submit that the effect of such a decision is to apply Section 3 to a family of contracts never intended to be reached by Congress and that such a conclusion is not required by the language of the Act. Moreover, an examination of the relevant cases discloses that prior to the decision below, the courts have never before applied Section 3 to contracts which did not clearly come within the purpose and intent of that Section.

A

It is plain from the legislative history of the Clayton Act that Congress intended only to prohibit certain practices whereby powerful sellers sought to monopolize the market for their goods by compelling retailers and small manufacturers to agree not to use the goods of their competitors.

It seems to us that the conclusion of the majority below stems in large part from its assertion that the legislative history of Section 3 is immaterial (R. 68). This is a surprising statement in view of the fact that in *Standard Oil*—the most recent Section 3 decision of this Court—the relevant legislative history was discussed repeatedly, the Court quoting excerpts from the statements of individual members of Congress (337 U. S. at 297, n. 4; 307, n. 10; 312, text and n. 15). Moreover, the Court actually amended its opinion as originally rendered to correct an error which it had made in describing that history (see 338 U. S. at 808 (1949))[5]. Of course, in cases too numerous to cite, this Court has repeatedly emphasized the crucial role of legislative history in interpreting a statute.

As will be seen, even a cursory examination of the legislative history of Section 3 incontrovertibly confirms Judge Weick's conclusion, in his dissenting opinion below that it is "all too clear that what Congress was aiming at was monopolistic practices of powerful sellers in the

5. This Court also discussed the legislative history of Section 3 in a 1936 case, *International Business Machines Corp.* v. *United States*, 298 U. S. 131, 137-38 (1936). Similarly, the legislative history of the Section was consulted in *Beloit Culligan Soft Water Service, Inc.* v. *Culligan, Inc.*, 274 F. 2d 29, 35 (1959); *Dictograph Products, Inc.* v. *Federal Trade Commission*, 217 F. 2d 821, 827 (2d Cir. 1954), *cert. denied*, 349 U. S. 940 (1955); and *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F. 2d 952, 955 (1st Cir. 1945), *cert. denied*, 326 U. S. 776 (1945).

distribution of goods whereby the dealer or buyer was prohibited from dealing in the goods of the seller's competitors," and that "read in the light of its legislative history, the Clayton Act was never intended to vitiate a requirements contract made by a single public utility to ensure a continuing supply of boiler fuels at a constant price" (R. 77, 81).

Specifically, the practices condemned by Congress were based on the use of two types of contracts, commonly known as "tying" agreements and "exclusive dealing" agreements. A "tying" agreement is one where the seller, having control of a unique and desirable article, either through a patent or a powerful position in the market, refuses to sell or lease that article to a retailer or manufacturer unless the buyer agrees also to buy from the seller other articles which he may need in his trade, and which the seller can supply. In other words, the right to use the patented or controlled article is "tied" to the user's agreement to buy from the seller certain non-patented or uncontrolled articles. An "exclusive dealing" agreement is one whereby a seller exerting similar economic leverage exacts the purchaser's agreement, as a condition to the right to purchase the desired article, not to deal in any similar and competing articles that might be offered by the seller's competitors. In other words, Congress was concerned with attempts by powerful sellers to monopolize the market for the sale of their goods.

Thus, in its Analysis of the Bill, the House Report [H. R. Rep. No. 627, 63rd Cong., 2d Sess. (May 6, 1914)], which was incorporated into the Senate Report [S. Rep. No. 698, 63rd Cong., 2d Sess. (July 22, 1914)], considered

the effect of Section 3 of the Clayton Act and at length spoke of the evils sought to be condemned:[6]

> "* * * Let us therefore consider what this section really accomplishes. It prohibits the exclusive or 'tying' contract made between the manufacturer and the dealer by purchase or lease, whereby the latter agrees, as a condition of his contract, not to use or deal in the commodities of the competitor or rival of the seller or lessor. It is designed *merely* to prevent this unfair trade practice now so common throughout the country, and which is generally regarded by everyone who has given the subject any serious consideration as unjust to the local dealer and to the community and as monopolistic in its effects. * * *
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> "* * * Where the concern making these contracts is already great and powerful, such as the United Shoe Machinery Co., the American Tobacco Co., and the General Film Co., the exclusive or 'tying' contract made with local dealers becomes one of the

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6. Section 3 as finally enacted was an amended version of Section 4 of the bill as originally passed by the House of Representatives, and, at that time, read as follows:

> "That any person engaged in commerce *who shall lease or make a sale of goods* * * * for use, consumption, or resale * * * on the condition or understanding that the lessee or purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the lessor or seller *shall be deemed guilty of a misdemeanor,* and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both, in the discretion of the court." H.R. Rep. No. 627, 63rd Cong., 2d Sess., 2 (1914) (Emphasis added). See 51 Cong. Rec. 9911 (1914).

Before its enactment as Section 3 the criminal sanctions were stricken and the qualifying clause "where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce" was added. Otherwise, the language is substantially the same.

greatest agencies and instrumentalities of monopoly ever devised by the brain of man. It completely shuts out competitors, not only from trade in which they are already engaged, but from the opportunities to build up trade in any community where these great and powerful combinations are operating under this system and practice. By this method and practice the Shoe Machinery Co. has built up a monopoly that owns and controls the entire machinery now being used by all great shoe-manufacturing houses of the United States.[7] No independent manufacturer of shoe machines has the slightest opportunity to build up any considerable trade in this country while this condition obtains. * * *

"* * * The system is wholly bad for consumers and the general public, and in its last analysis detrimental to the interests of local dealers generally. We have penalized this practice under the provisions of section 4 [now section 3] and made it a misdemeanor punishable as prescribed in the section." H.R. Rep. No. 627, 63rd Cong., 2d Sess., 11-13 (1914) (Emphasis added).

Similarly, on the floor of Congress, from the very beginning of the debates, the bill was treated as one designed for the protection of buyers from over-powerful sellers or lessors. For example, Congressman Webb, a member of the House Committee on the Judiciary, to

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7. Congress was particularly disturbed by the practice of United Shoe to lease patented machinery essential to successful competition in the industry, on condition that supplies and non-patented machines be obtained from the lessor. See *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451 (1922). Thus, after the House version of the bill had been substantially approved by the Senate Committee, the Section was changed on the floor of the Senate so as to apply exclusively to the practice of tying non-patented articles to a sale or lease of a patented article. 51 Cong. Rec. 14273-76 (August 26, 1914). The broader coverage was restored in Section 3 as finally agreed to in conference. See H.R. Rep. No. 1168, 63rd Cong., 2d Sess., 2, 11 (1914).

which the bill had been referred, described its purpose as follows:

> "• • • I contend, Mr. Chairman, that no one has the right to *sell* goods to a purchaser and receive his money for them and at the same time *compel* such purchaser to refuse to sell a competitive article. Such contract in itself is in restraint of trade and tends directly to monopoly. This practice has been in vogue in the United States for 20 years, and there is scarcely a retail merchant throughout this broad land who has not suffered from such practice, because our country has been literally plastered with these exclusive-sale contracts. • • •" 51 Cong. Rec. 9072 (May 22, 1914) (Emphasis added).

Congressman Webb later amplified this view:

> "It means simply this, that if I am a manufacturer or a wholesaler, and go to a small town and pick out the most popular merchant in that town —I have advertised my goods well—and, of course naturally he is anxious to buy them. I go to this most popular merchant and tell him that I will let him buy my goods, provided he will not sell or carry in stock any of my competitor's goods. Now, I do not know how other gentlemen may look at such a contract, but that contract, in my opinion, is in and of itself a contract in restraint of trade. • • •
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> "• • • I do not believe there is a man on either side of the House who will say that it is right or fair business for a manufacturer to make a contract with the merchant to sell only his goods and that he shall not sell goods that compete with his. It ought not to be allowed." 51 Cong. Rec. 9406, 9407 (May 28, 1914).

To Congressman Floyd, also a member of the House Judiciary Committee, the statute was an act of liberation for the local independent merchant:

> "• • • The object of this section is to break up the power of giant monopoly and to liberate and free every small dealer in this land and put him in a position of independence in which he can do business in competition with any other business man in this country. • • •" 51 Cong. Rec. 9160 (May 23, 1914). See also 51 Cong. Rec. 9161 (May 23, 1914).

Congressman Taggert, who also was a member of the House Judiciary Committee, declared:

> "Section 4 of the bill will afford *relief* to retail dealers, who are now required by wholesalers to handle certain articles exclusively and become sole agents for certain goods. • • •" 51 Cong. Rec. 9198 (May 25, 1914) (Emphasis added).

In the Senate Section 3 (still Section 4 at that time) was explained in terms of striking down only contracts which prohibited a retailer from selling competing goods to his customers. Senator Reed, a member of the Senate Committee on the Judiciary, to which the Senate bill had been referred, explicitly stated this as the purpose of the bill:

> "• • • What the bill aims at is the case of a vendor of goods, selling them to a dealer upon the express provision, *not that the dealer will handle his goods, but that the dealer will not handle anybody else's goods,* thus depriving the public of the opportunity to buy both classes of goods over the same counter and in actual competition, and also depriving the dealer of his opportunity to buy in the open market and from whomsoever he pleases."

51 Cong. Rec. 14270 (August 26, 1914) (Emphasis added). See also 51 Cong. Rec. 14226 (August 25, 1914).

Finally, we would point out that the application of Section 3 to a contract for the supply of a consumer's requirements which was desired by both buyer and seller was expressly disavowed by the sponsors of the statute. Thus, in the hearings before the House Committee on the Judiciary, on February 26, 1914, Herbert Noble, an attorney, addressed the Committee on behalf of his client, John A. Roebling Sons Co., bridge builders who were also manufacturers of wire rope. Mr. Noble expressed concern lest Section 3 should be construed to ban the wire rope requirements contracts Roebling had made with industrial consumers. With Representative Clayton presiding in the Chair, Representative Charles C. Carlin of Virginia, a member of the Judiciary Committee, replied to Mr. Noble's queries as follows:

> "Mr. Carlin: I do not think this statute covers that.
>
> "Mr. Noble: It says you may not make an exclusive contract to buy all your goods from one man.
>
> "Mr. Carlin: No; it does not. It simply says a man shall not require you to make an exclusive contract to sell his goods only.
>
> • • •
>
> "Mr. Noble: Do you mean the word 'dealing' only refers to jobbers and not to consumers?
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> "Mr. Carlin: *That statute has no reference to consumers.* It is intended to apply to merchants generally. • • •" Hearings before the Committee on the Judiciary of the House of Representatives on Trust Legislation, 63rd Cong., 2nd Sess., 967 (1914) (Emphasis added).

In short, the purpose of Congress was to strike solely at practices whereby economically powerful sellers sought to pre-empt or monopolize the market for their goods by forcing their customers to agree not to deal in or use goods offered by their competitors. Congress had no intention of drafting an Act that would strike down a contract such as that at bar.

B

The language of the Act is apt and appropriate to carry out the limited purposes Congress had in mind. It should not be so construed as to outlaw contracts which do not violate those purposes.

When the language of the Act is read in the light of this Congressional intent, we think it becomes perfectly clear that the words used are both apt and appropriate to describe the particular practices which Congress was attempting to prevent. In the first place, we submit that the natural implication of the words "It shall be unlawful • • • to • • • *make a sale or contract for sale* • • • or fix a price charged therefor, or discount from, or rebate upon, such price, *on the condition* • • • that the • • • purchaser thereof *shall not* • • •" is that it is unlawful for a *seller* to *impose* the exclusive dealing condition upon a buyer[8]. That is not the language one would normally use to describe a situation such as that at bar, where a seller and consumer with equal bargaining power, and for their mutual business advantage, have freely entered into a contract for the supply of a limited portion of the purchaser's requirements for a term of years. If that had been the intent of Congress, the Act need

8. That the Act is directed solely at sellers is indubitably shown by the fact that, as originally adopted by Congress, the Act made it a crime for a seller to impose such a condition. See note 6, *supra*.

merely have provided in this basic clause that "It shall be unlawful for any person to enter into a contract for the sale *or purchase* of a substantial quantity of goods • • •." But that is not what Congress provided.

It follows that there can be no illegality unless it is shown that the seller exacted, or at least had the economic power to exact, the restrictive condition from the purchaser. This is especially true where the buyer, the party for whose protection the statute was enacted, is the one seeking to enforce the contract. Thus, to allow the respondents to escape their obligations under the instant contract by resort to Section 3 would be a complete perversion of the intent of Congress in passing that statute.

Similarly, we think it is plain that the words of the qualifying clause, "where the effect of such • • • sale or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce" must be construed as referring only to an attempt to lessen competition or create a monopoly in the "relevant market"—*i.e.* the market in which the seller and its competitors can sell their goods. If this qualifying clause were intended to reach a single contract such as that at bar, whereby a buyer and seller, dealing at arm's length and with equal bargaining power, agree, each for his own business reasons, that the seller will furnish a part of the buyer's requirements, and such requirements can be said to be "substantial", then this part of the Act need merely have read: "where the sale or contract for sale covers a substantial volume of goods." A single consumer of fuel, such as petitioner, is not a "market", but merely one of the many thousands of potential customers who compose the market in which respondents and

their competitors can sell coal or other fuels. It is obvious that Congress never intended the Act to apply to such a situation.

The majority below concluded that simply because the Act "expressly refers to *'a'* contract for sale *'for use,* consumption or resale'" Section 3 of the Act was applicable to a situation such as that at bar (R. 68). But when these words are considered in the light of the expressed Congressional purpose, it becomes apparent that they were necessary in order to carry out that purpose. If a single contract were not made unlawful, the Act would not have reached a single contract with a chain-store company covering a substantial segment of the market. The use of the singular was also necessary in order to enable a single purchaser who considered himself injured by an unlawful exclusionary contract to bring a proceeding to have it set aside, or to recover treble damages in a suit brought under Section 4 of the Clayton Act.[9] Moreover, if the Act had omitted the words "use" and "consumption", it would not have been effective to reach tying contracts whereby patent holders such as United Shoe tied the sale of unpatented goods to the lease or sale of patented machinery or articles used or consumed in a manufacturing process—the particular practice which, as the legislative history shows, gave rise to the controversy resulting in the adoption of Section 3.

Thus, the use of these words was both necessary and appropriate to carry out the Congressional intent. They need not, and therefore, should not, be so construed as to extend the coverage of the Act to a family of contracts never contemplated by Congress. *Oates* v. *National Bank,* 100 U. S. 239, 244 (1879). No doubt, under that language, a contract for the supply of a single consumer's

9. 38 Stat. 731 (1914), 15 U. S. C. §15.

requirements might violate the Act if the seller were capable of imposing the exclusive dealing feature, and either the contract were one of a series of similar contracts designed to pre-empt the market or conceivably, the single consumer constituted so substantial a part of the market that the contract could be deemed to have the effect of substantially lessening competition therein. But it does not follow that the use of these words extends the coverage of the Act so as to include an isolated contract for consumption entered into under the circumstances here present.

C

Until the decision below, Section 3 has never been applied to a contract which did not embody the specific evils at which the Act was directed.

In the Courts below, respondents relied upon nine cases dealing with "tying" contracts and ten cases concerning "exclusive dealing" contracts. We believe that these include the leading cases in which a contract has been held unenforceable because of a violation of Section 3. An examination of these cases will show that every one of them was based upon a contract involving all of the elements which Congress had regarded as objectionable when it adopted Section 3, none of which is present in the contract at bar.

(1) While cases involving tying contracts are not directly relevant, they nevertheless establish that it is necessary under Section 3 to prove that the seller had sufficient economic leverage to induce a substantial number of buyers in the relevant market to deal exclusively with it. They show also that the Act is directed solely against the seller.

Of the cases involving tying contracts, five involved attempts to extend a patent monopoly over unpatented articles,[10] and in four, the seller was held to have such powerful market control over the "tying" product, even though it was not patented, as to enable it to restrain trade in the "tied" product.[11] Such contracts are intrinsically contracts in restraint of trade; straight requirements contracts are not. As Mr. Justice Frankfurter pointed out in *Standard Oil*, 337 U. S. at 305-06: —

> "• • • Tying agreements serve hardly any purpose beyond the suppression of competition. • • • In the usual case only the prospect of reducing competition would persuade a seller to adopt such a contract and only his control of the supply of the tying device, whether conferred by patent monopoly or otherwise obtained, could induce a buyer to enter one. • • •

10. *International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *International Business Machines Corp.* v. *United States*, 298 U. S. 131 (1936); *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. 2d 764 (6th Cir. 1936); *Radio Corporation of America* v. *Lord*, 28 F. 2d 257 (3rd Cir. 1928); *United States* v. *Linde Air Products Co.*, 83 F. Supp. 978 (N.D. Ill. 1949).

11. *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1 (1958); *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F. 2d 952 (1st Cir. 1945), *cert. denied*, 326 U. S. 776 (1945); *Signode Steel Strapping Co.* v. *Federal Trade Commission*, 132 F. 2d 48 (4th Cir. 1942); *United States* v. *American Can Co.*, 87 F. Supp. 18 (N.D. Cal. 1949).

> "Requirements contracts, on the other hand, may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public. • • •"

The contract at issue of course is not a tying contract so that these cases are not directly relevant. Nevertheless, they establish the proposition that there can be no violation of Section 3 of the Clayton Act in the absence of economic leverage based on the seller's control of the tying product. As Mr. Justice Black pointed out in holding a tying contract unlawful in *Northern Pacific Railway Co.* v. *United States,* 356 U. S. 1, 6-7 (1958):

> "• • • Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most. As a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."

These cases are also significant in that in each case a seller or lessor or licensor was enjoined, at the suit of the Government or of a competitor of the seller, from enforcing tying agreements which it had a practice of exacting from a substantial number of merchants or manufacturers, as a condition to the purchase or license of the "tying" product. As we have seen, in the case at bar it is conceded that the seller had no market control whatever, and it is the seller itself which is attempting to avoid its contractual obligations, while the buyer is urging that they be carried out.

(2) Cases involving exclusive dealing contracts, which sometimes have been cast in the form of "requirements" contracts, likewise show that such contracts are unlawful only when the seller, having economic leverage, seeks to pre-empt a substantial segment of the market for his goods by the imposition of exclusive dealing agreements, and again the sanctions are directed solely against the seller.

The remaining ten cases cited by respondents in the Court below concern exclusive dealing contracts. Three[12] of the ten cases revolved around the abuse of patent privileges by specifications in licensing agreements that the licensee could not deal in competitive products. These cases are similar to the straight tying contract cases and were decided on the ground that the agreements were unlawful "as extending a patent monopoly beyond permissible limits" (185 F. 2d at 816). Thus they are not directly relevant for our purposes, since no abuse of patent rights is in any way in issue. However, like the tying contract cases, they show that the presence of economic leverage by a seller is the *sine qua non* of illegality.

In the seven straight exclusive dealing cases cited below by respondents, the courts invariably applied the same standards for determining unlawfulness which had led Congress to adopt Section 3: Economic leverage by the seller coupled with a practice of tying up a substantial segment of the relevant market by means of exclusive dealing agreements; and in each case the *seller* alone was enjoined from enforcing the prohibited agreements:

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12. *Dole Refrigerating Co.* v. *Kold-Hold Mfg. Co.*, 185 F. 2d 809, 816 (6th Cir. 1950); *McCullough* v. *Kammerer Corp.*, 166 F. 2d 759 (9th Cir. 1948), *cert. denied*, 335 U. S. 813 (1948); *National Lockwasher Co.* v. *George K. Garrett Co.*, 137 F. 2d 255 (3rd Cir. 1943).

(a) In all seven cases, the defendant sellers had economic leverage resulting from powerful positions in their respective markets. Thus, Standard Oil Company[13] sold its name brand gasoline to 23% of the Western market, and was the largest seller in that market; the members of the Fashion Originators' Guild[14] sold in the United States more than 60% of all women's garments wholesaling at $10.75 and above; Standard Fashion Company[15] sold its branded "Standard Patterns" to 40% of the retail pattern agencies in the country; Dictograph Products, Inc.,[16] seller of "Acousticon" hearing aids, was one of the nation's three largest hearing aid manufacturers; Anchor Serum Company[17] was the largest producer of various animal health products for sale to the general public, which it marketed under the name of "Anchor Products"; Richfield Oil Corp.[18] annually sold over $36,000,000 of branded gasoline under exclusive contracts with retailers blanketing a six-state area; and Pullman Company[19] was the sole supplier in the United States of railroad sleeping cars and sleeping car service.

(b) In all seven cases the defendants had followed a practice of requiring exclusive dealing agreements from a large number of key outlets, *i.e.* "the relevant mar-

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13. *Standard Oil Co. of California* v. *United States*, 337 U. S. 293 (1949).

14. *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457 (1941).

15. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346 (1922).

16. *Dictograph Products, Inc.* v. *Federal Trade Commission*, 217 F. 2d 821 (2d Cir. 1954), *cert denied*, 349 U. S. 940 (1955).

17. *Anchor Serum Co.* v. *Federal Trade Commission*, 217 F. 2d 867 (7th Cir. 1954).

18. *United States* v. *Richfield Oil Corp.*, 99 F. Supp. 280 (S.D. Cal. 1951), *aff'd per curiam*, 343 U. S. 922 (1952).

19. *United States* v. *Pullman Co.*, 50 F. Supp. 123 (E.D. Pa. 1943).

ket," for their products: 6,000 retail gasoline outlets in the Western area,[13] 12,000 garment retailers throughout the country,[14] 40% of the 52,000 retail pattern agencies in the country,[15] 22% of the nation's one thousand choicest retail outlets for hearing aids,[16] the largest distributors of various animal health products in the key states of Illinois and Iowa (plus 14 other wholesalers),[17] 3,000 gasoline stations in the West,[18] the major railroads in the country.[19]

(c) In all seven cases the party asserting the illegality of the contracts was either the government acting in the interest of the public, or a dealer who wished to deal with competitors of the seller, and in each case the seller alone was forbidden to enforce the contract.

It is also to be noted that in all but two of the foregoing cases, the exclusionary agreement was in the form of an express condition. The two exceptions are *Standard Oil* and *Anchor Serum Co.* v. *Federal Trade Commission*, 217 F. 2d 867 (7th Cir. 1954) where the contracts were cast in the form of "requirements" contracts. But in these cases, while the contracts did not in terms contain the unlawful condition *in haec verba*, they had the identical effect: Instead of agreeing not to purchase from the seller's competitors, the purchasers, in one case some 6,000 gasoline filling station operators and in the other some 16 wholesalers of hog serum, agreed to buy all their requirements of gasoline or hog serum from the selling company. Thus while these contracts are generally described as "requirements" contracts, they were identical in every respect with the type of "exclusive dealing" agreement which was expressly condemned by Congress.

Thus, we do not know of a single case in which the Act has been applied to a contract which 1) did not in fact

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13-19. See page 35, *supra*.

prevent the buyer from dealing with the seller's competitors, 2) was not entered into by a seller who enjoyed a powerful bargaining position vis-a-vis the purchaser and 3) represented an isolated commercial transaction with a single customer in the available market for the seller's goods.

Nor do we know of a single case in which a seller has been permitted to evade his contractual obligations on the plea that the contract violated Section 3.

III

The contract at bar contains none of the evils at which Section 3 was directed.

As we have seen in Points I and II, *supra*, the contract at bar is not even an exclusive dealing agreement and therefore does not violate the basic evil at which the Act was directed. We shall now point out that even if the conclusion of the Court below that the contract comes within this portion of the Act were tenable, this contract would not be illegal because (a) it is conceded that the seller neither imposed nor had the economic power to impose the requirements provision, (b) the contract does not "substantially lessen competition or tend to create a monopoly" by tying up any substantial segment of the market for the goods of respondents and their competitors, and (c) it is manifest from the facts of this case that instead of lessening competition this contract created competition by breaking into an existing monopoly.

A

Concededly, the seller under the contract at bar did not impose and did not have the economic power to impose the "requirements" provision on the buyer.

As was expressly conceded by respondents in the Courts below:

> "The seller [respondents' predecessor] did not occupy a dominant position in the business of producing or selling coal. On the contrary, according to the plaintiff [petitioner] there are over 700 coal producers who produce coal suitable for its requirements * * *" (R. 43).

Indeed, respondents have gone so far as to insist that it was the buyer, petitioner, rather than the seller, which "had overwhelming power or leverage. It was the only large coal consumer in the area, and the seller was faced with intense competition in the depressed coal industry" (R. 43).

Thus it is undisputed that the seller in this case was not in a position to impose the allegedly unlawful requirements provision on the buyer and that it did not do so. On the contrary, the requirements provision was desired by and economically necessary to both buyer and seller. This, of course, is normally the situation when a requirements contract of this kind is entered into. Petitioner, as a regulated public utility, would not have constructed a coal burning plant at a cost of $3,000,000 more than a comparable oil burning station (R. 32) if it had not been assured of an adequate supply of coal at an agreed price for a sufficient term of years to justify the prudence of its investment. Moreover, it is the duty of a public

utility to make provision for the supply of its fuel requirements at reasonable prices for as long a period as possible so as to stabilize its rates to consumers.

It is, of course, equally true that in the case at bar the seller would presumably have been unwilling to spend in excess of $7,500,000 in preparation for its performance under the contract (R. 32) if it had not been assured that it could sell its coal at a price reasonable to it, and for a similar term of years.

Thus this contract bears no resemblance to the type of contract at which the Act was directed. Moreover, since no part of the contract was "imposed" by the seller on the buyer, there is a total absence of one of the primary evils at which the Act was directed.

B

In any event, the contract at bar does not "substantially lessen competition or tend to create a monopoly" within the meaning of the Act, since it involves only a single consumer whose maximum requirements would be less than 1% of the coal sold in the open market by respondents and their competitors.

Even if the contract at bar contained an exclusive dealing condition which had been imposed by the seller, it would not be unlawful because it does not meet the substantiality test contained in the qualifying clause. As we have pointed out above, petitioner is not a coal market. It is but one of the many thousands of consumers who constitute the market in which the respondents and their 700 competitors can sell their coal. Thus the contract at bar does not constitute part of a practice by the seller to pre-empt the market for its product by exacting

exclusive dealing provisions from as many of its customers as possible.

As pointed out by this Court in *United States* v. *E. I. duPont de Nemours & Co.*, 353 U. S. 586, 593 (1957):

> "Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.'[20] *Substantiality can be determined only in terms of the market affected.*" (Emphasis added).

Despite this holding, the majority of the Court below made no attempt to define a market. It merely held the contract unlawful because the estimated "total dollar pre-emption over the life of the contract at the minimum price of $6.40 per ton would amount to $128,000,000.00. This is, of course, not insignificant or insubstantial" (R. 72). We submit that Judge Weick was correct when he dissented on the ground that:

> "I cannot consider a single contract with a single utility serving only 3% of the land area and 11% of the population of a single state as 'substantially lessening competition or tending to create a monopoly'." (R. 89; see R. 63).

It is a matter of common knowledge that coal—the subject matter of the contract at bar—is one of the most competitive products in this country.[21] See *Appalachian*

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20. Quoting from the statement in *Standard Oil* that "since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition" (337 U. S. at 299-300 n. 5).

21. As respondents have stated: "* * * the seller was faced with intense competition in the depressed coal industry" (R. 43).

Coals, Inc. v. *United States*, 288 U. S. 344 (1933).[22] Six times as much land in the United States is underlain with coal deposits as is devoted to the production of wheat.[23] As Justice Reed remarked in *United States* v. *E. I. duPont de Nemours & Co.* 351 U. S. 377, 392 (1956), "If a large number of buyers and sellers deal freely in a standardized product, such as salt or wheat, we have complete or pure competition." By this definition, the coal industry is purely competitive. It presents a sharp contrast to the situation in the *Standard Oil* case, where exclusive supply contracts limited 6,000 retail gasoline outlets comprising 16% of the stations in the seven-state Western market to the use of "Standard" products, were also used for a similar exclusionary purpose by the six major competitors of Standard (which itself was the largest seller of gasoline in the market), and "effectively foreclose[d] whatever opportunity there may be for competing suppliers to attract [a dealer's] patronage" (337 U. S. at 295, 314). On the other hand, the contract at bar is an insignificant transaction in a fungible product which constitutes a drop in the bucket as far as the marketing of coal in this country is concerned. Official Government statistics indicate that, at the time the contract was entered into, the more than 700 coal producers which respondents have acknowledged are capable of supplying coal to petitioner (R. 43) produced an annual total of 359,289,000 tons of coal and sold in the

22. "• • • the bituminous coal industry under normal conditions affords most exceptional competitive opportunities." (288 U. S. at 368).

23. Compare Department of Interior, Geological Survey Circular 293, Coal Resources of the United States, p. 14 (1953) (424,450 square miles, *i.e.* 271,638,00 acres, of the United States were underlain with coal-bearing rocks in 1953) with Department of Agriculture Wheat Marketing Service, The Wheat Situation (WS-158), p. 12 (1958) (43,664,000 acres of the United States were in wheat production in 1957).

open market 290,567,000 tons annually.[24] Thus petitioner, which has estimated the *maximum* annual coal needs of Gannon Station at 2,250,000 tons (R. 27), is an insignificant outlet consuming the equivalent of less than 1% of the total amount of coal to be marketed by respondents' competitors, who are still free to sell their products to any of the multitude of fuel users in Florida and at least the other states east of the Mississippi River.[25] Moreover, in terms of all boiler fuels competing in the market, such as oil, coal, and natural gas, the amount of fuel covered by the contract at bar is even more infinitesimal.

To show that this contract substantially lessens competition or tends to create a monopoly within the meaning of the Act, it would be necessary for respondents to show that they had tied up a substantial segment of the "relevant market" within which there is "effective competition" between other sellers of boiler fuel and themselves. An isolated contract of sale whereby a single consumer such as petitioner arranges for the supply of a part of its fuel requirements from a single supplier cannot have any such result, and therefore cannot come within the purview of the Act.

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24. Bureau of the Census, 1954 Census of Mineral Industries, Distribution of Bituminous Coal and Lignite (Series: MI-12B), p 4 (1957).

These 700 producers are located in Districts 1-4, 6-11 and 13, as defined in the Bituminous Coal Act of 1937, 50 Stat. 91-94. The states included in these Districts are principally Alabama, Tennessee, Kentucky, Virginia, West Virginia, Pennsylvania, Ohio, Indiana and Illinois.

25. In terms of the total amount of fuel consumed in the state of Florida alone, the Court of Appeals for the District of Columbia has held that an amount of natural gas equivalent to 4,000,000 tons of coal per year, or almost twice the maximum quantity of fuel which can be affected by the instant contract, is "meager." *Florida Economic Advis. Coun.* v. *Federal Power Commission*, 251 F. 2d 643, 649 (D.C. Cir. 1957), *cert. denied*, 356 U. S. 959 (1958), *affirming* 16 F. P. C. 118, 146 (1956). (For a statement of fuel equivalents, see R. 31-32).

C

The contract at bar actually created competition by breaking into an existing monopoly and compelling it to reduce its prices.

The contract at bar not only failed to cause a substantial *lessening* of competition; it had the exact opposite effect of *creating* competition where none had existed before. As noted by the Court below, "at the time the contract was entered into, coal accounted for less than 6% of the fuel consumed in the entire state of Florida. Every electric generating installation in peninsular Florida burned oil at that time" (R. 67). Moreover, the contract represented the first time in recent decades that a significant quantity of coal was to be sold to *any* fuel user in peninsular Florida, which had long been monopolized by oil (R. 31). When the first coal burning unit at Gannon Station went into operation in August of 1957, the initial inroad upon this oil monopoly was made and—if respondents had not welched on their contractual obligations—would have been made by coal supplied by them. As the record expressly shows, shortly thereafter, respondents' competitor offered to supply coal for use in petitioner's oil burning units, with the direct result that petitioner's oil supplier was compelled to reduce its price in order to meet the new competition (R. 42). Nothing could be more in harmony with the antitrust laws. See, e.g., *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 495 & n. 16 (1940); *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 360 (1933); *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 355 (1922).

These facts clearly demonstrate the error of the Court below in stressing, as a basis for holding the instant contract illegal, the fact that "at the estimated 1959 rate of consumption, namely 700,000 tons per year, [Gannon

Station] would about equal peninsular Florida's annual coal consumption prior to the execution of the contract" (R. 72). This is only so because, prior to the contract, oil had a virtual monopoly of the Florida fuel business. Of course, when a new product is introduced into an area, the user of that product, at least at the time of its introduction, has a "monopoly." But there is nothing illegal in that. Under the Court's theory, if petitioner obtains the first atomic power plant in Florida, as it may well do by 1964 (R. 42-43), it will have an "illegal monopoly" of atomic power.

The competitive situation which confronts the Court in the instant case is almost identical with that presented to the Federal Power Commission in *In the Matter of Houston Texas Gas and Oil Corp. and Coastal Transmission Corp.*, 16 F.P.C. 118 (1956), *aff'd sub nom. Florida Economic Advis. Coun.* v. *Federal Power Commission*, 251 F. 2d 643 (D. C. Cir. 1957). In that case Houston Gas applied for a certificate of public convenience and necessity to serve peninsular Florida with natural gas. Because oil and coal can be used as boiler fuel as readily as natural gas, the Federal Power Commission, in the interest of preserving natural gas resources, had been reluctant to authorize natural gas service to utilities. In the *Houston Gas* case, however, the Commission thought that the public interest would best be served by supplying peninsular Florida with a fuel that could compete with oil:

> "Florida is a fuel have-not area of the nation, possessing practically no native usable energy supplies. Although it has a growing population and a considerable industrial potential, it is almost entirely dependent on imported energy to meet its domestic, industrial and power generating requirements. *Florida's dependency on imports consisting chiefly of petroleum products brought in by tanker*

and barge makes its economy vulnerable to interruptions of this single source of supply and is moreover undesirable from the competitive standpoint." (16 F.P.C. at 122-23) (Emphasis added).

• • •

"At the outset, we may observe that the fact that this arrangement involves the transportation of very substantial volumes of gas for use as boiler fuel does not require its rejection. In this regard, this case is *sui generis*. We have already detailed the characteristics of the Florida market which require us, in the public interest and within the limitations of our permissible discretion, to admit of a departure in this case from the standards we have heretofore applied in determining whether to approve of boiler fuel sales." (16 F.P.C. at 131-32).

Thus, in order to combat the Florida oil monopoly, the Federal Power Commission determined that it would depart from its prior policy of conserving the limited reserves of natural gas and permit it to be sold as fuel for power generating boilers in peninsular Florida. *Moreover, to ensure that natural gas gained an effective foothold in Florida, the Commission insisted upon twenty year requirements contracts and conditioned its approval of the plan on the parties agreeing to expunge all cancellation provisions from their contracts* (16 F.P.C. at 135). The Commission's determination was sustained by the Court of Appeals for the District of Columbia Circuit, where it was attacked by oil companies which complained that their business would be injured by the proposed pipe line. As the Court pointed out:

"• • • The 'injury' to petitioner [the oil concerns] is that it must share what has heretofore amounted to a power monopoly." *Florida Economic Advis. Coun.* v. *Federal Power Commission*, 251 F.

2d 643, 649 (D. C. Cir. 1957), *cert. denied*, 356 U. S. 959 (1958).

We respectfully submit that this Court, in applying antitrust laws expressly enacted to enhance competition, should be as influenced by the compelling circumstances of the Florida fuel situation as was the Power Commission in applying the Natural Gas Act.

In the context of Section 3 itself, *Excelsior Motor Mfg. & Supply Co.* v. *Sound Equipment, Inc.*, 73 F. 2d 725 (7th Cir. 1934), *cert. denied*, 294 U. S. 706 (1935), illustrates the determinative role of competitive factors similar to those considered by the F.P.C. in *Houston Gas.* In that case plaintiff sued for breach of a contract pursuant to which it was permitted to purchase the defendants' sound production equipment for resale, on condition that it not deal in competitive products and that it not resell the equipment below a certain fixed price. In other words, it was a true exclusive dealing contract, which, of course, the present contract is not. The Court rejected the sellers' defense based upon Section 3, because the contract, if performed, would have created competition in a field where none had existed previously:

> "It is difficult to believe that [the sellers] are serious in arguing that the contract in suit violates the Clayton Act because it fixes a resale price and provides that [the purchaser] shall not deal in the products of any competitor * * *. The evidence amply supports the finding of the trial court that the contract in suit did not violate the Clayton Act. On the contrary, had [the sellers] carried out the provisions of the contract and produced a successful machine at the price fixed, it would have tended to introduce some competition into a field where Western Electric Company had, by virtue of its being the first company to produce a commercially

practical equipment, a virtual monopoly." (73 F. 2d at 728).

Because the instant contract *created* rather than lessened competition, it cannot be held to violate the qualifying clause of Section 3, and the decision below must be reversed on this ground alone.

IV

By outlawing every substantial contract for the supply of a single consumer's requirements of raw materials, the decision below will cause grave injury to the economic life of the country and to public utilities in particular.

We believe that the inescapable conclusion from the logic of the decision below is that any contract for the purchase of a substantial volume of goods, even though the quantity be fixed by the contract, is unlawful. It is true that the Court below sought to distinguish the contract at bar from a contract for a fixed quantity, but as we pointed out at pages 16-17, *supra*, we think the Court's attempted distinction proves that, on the contrary, it is indistinguishable. Certainly, if the decision stands, we doubt if any responsible lawyer could advise his client that a contract for the purchase of a substantial volume of goods was beyond the reach of Section 3 of the Clayton Act.

But even if the Court's attempted distinction were valid, the decision below is certainly applicable to any contract for the supply of a single consumer's substantial "requirements," or even the substantial requirements of a single plant or factory of a single consumer, even though desired by the buyer, and regardless of whether or not it has any

substantial effect upon the available market for the seller's goods. We think we have demonstrated above that as a matter of law such a result is neither necessary nor consistent with the language of Section 3 when read in the light of the Congressional intent. We shall now show that from an economic standpoint such a result would not only do violence to the obvious and expressed intent of Congress, but would do grave damage to the economic life of the country.

This Court has had several occasions to consider the economic effect and necessity of contracts whereby industrial consumers make provision for their fuel requirements for a long term of years. For example, as long ago as 1931, in *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U. S. 353, 358 (1931) this Court held that such a requirements contract, which "was not arbitrarily or unfairly imposed upon the glass company [the buyer]," "does not subject the glass company to, or tend in any manner to impose upon the public, any wrong, disadvantage or evil attributable to monopoly or restraint of trade."

More recently, in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, 344 (1956), in holding that the Natural Gas Act had not outlawed long-term contracts for the supply of a utility company's requirements of natural gas, this Court pointed out:

> "• • • By preserving the integrity of contracts, [this decision] permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. Conversion by consumers, particularly industrial users, to the use of natural gas may frequently require substantial investments which the consumer would be unwilling to make without long-term commitments from the distributor, and the distributor can hardly make

such commitments if its supply contracts are subject to unilateral change by the natural gas company whenever its interests so dictate."

On the basis of that decision the Court also approved a 15-year contract for the supply of a public utility's requirements of electric power. *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U. S. 348 (1956).

As we have seen, in the *Houston Gas* case the Federal Power Commission, with the approval of the United States Court of Appeals for the District of Columbia, has recently found such contracts economically necessary, and has insisted that, before a certificate of public convenience or necessity could be granted to a pipe line company to build a pipe line to supply gas to peninsular Florida, the seller should enter into binding 20-year requirements contracts with its major prospective customers. See pages 44-45, *supra*.

It is true that in these cases no question of a violation of Section 3 was raised and that each dealt with a regulated public utility.[26] We cite them primarily as illustrative of the economic background and necessity of a contract such as that here involved, and secondly, to point out that if the decision below were allowed to stand, grave doubt would be cast on the legality of contracts identical with those which this Court sustained in these cases. It must also be borne in mind that in the instant case petitioner is a regulated public utility.

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26. However, in the *Twin City* case discussed *supra*, the buyer—the largest consumer of natural gas in Fort Smith, Arkansas—desired to invalidate a full requirements contract for the supply of gas in order to be free to deal with a competitor of the seller, namely, a natural gas pipe line company which the buyer controlled. As we have seen, even though the contract necessarily precluded the buyer from dealing with a competitive source of fuel "so long as the pipe line company could adequately supply" the buyer's requirements (283 U. S. at 355), this Court held that it did not violate any anti-trust policy and was enforceable in accordance with its provisions.

The record discloses that, economically speaking, a long-term requirements contract was just as necessary to both the buyer and seller in the case at bar as it was in the cases above cited, if any business transaction between them was to take place at all. Just as it was necessary to have a requirements contract satisfactory to the Ideal Cement Company before it would erect a gas burning cement plant in Mobile, Alabama (see 350 U. S. at 336), so it was necessary for petitioner, particularly because it is a regulated public utility required to justify the prudence of its capital expenditures, to make firm and adequate provision for its future supplies of coal before it embarked upon the construction of a coal burning plant at a cost of over $3,000,000 more than it would have cost to build an oil burning plant (R. 32).

Similarly, the position of the sellers under the contract at bar was almost identical with that of the natural gas pipe line company in the *Houston Gas* case: As noted by the Court below (R. 67), the respondents have made an investment of over $7,500,000 in making preparation for the shipment of the coal involved in the contract from Uniontown, Kentucky, to petitioner's dock at Tampa, Florida (see R. 32), just as Houston Gas had to build a pipe line in order to serve its customers in peninsular Florida. Such investments cannot be safely made without long-term commitments.

This of course is substantially true in any situation where a utility company, manufacturer or other industrial consumer is arranging for the supply of the raw materials needed in its plant. It is always good business for such a consumer to make adequate and reliable arrangements for its future requirements at a price which it believes to be advantageous, and if a substantial investment must be made by either buyer or seller to carry out the contract, a long-term contract is absolutely necessary.

Thus the contract at bar is not unique or unusual. It is merely an example of the normal, simple and economically sound method by which consumers of substantial quantities of raw material in the manufacturing process customarily arrange for their supplies. We have no doubt that there are thousands of such contracts in this country. Congress never intended to outlaw such arrangements, for they involve none of the evils which Congress was attempting to prevent when the Act was under consideration. Moreover, we submit that Congress could not reasonably be expected to have so intended. For it is self-evident that the economic consequences on the business life of this country resulting from outlawing all such arrangements would be incalculable, especially for public utilities such as petitioner and the public they serve.[27] On this issue we refer to the statement of Judge Weick in his dissenting opinion below:

> "[Petitioner] was under obligation to the public to furnish a continuous supply of electricity at rates fixed by the public utilities commission. To meet these obligations it was not only desirable, but absolutely necessary that it be supplied with the boiler fuel to make the electricity. Its rates could not be fixed for any appreciable length of time if it were required to depend upon a fluctuating market price for boiler fuel. It would certainly not be in the public interest to require a utility to purchase boiler fuel on short term contracts or on the open market so that every time there was a shift in the market price, the utility's rates to the public would have to be adjusted. * * * A

27. As stated in the Report of the House Committee on the Judiciary: "The [Clayton] bill is not designed to destroy or hinder business, but on the contrary, to help business and the whole people of the country who are related to or affected by it." H.R. Rep. No. 627, 63rd Cong., 2d Sess., 7 (1914).

requirements contract • • • to ensure a continuing supply of boiler fuels at a constant price • • • is not only an economic necessity in circumstances such as these, but also serves the best interest of the public, who in the long run must shoulder the burden of increased costs of the utility." (R. 78-79, 81).

V

A seller cannot repudiate a contract of sale which the purchaser wishes to enforce on the alleged ground that it, the seller, unlawfully entered into the contract in violation of Section 3.

As we have seen, the sole purpose of Section 3 of the Clayton Act is the protection of buyers, as a class, from coercive action by powerful sellers. The Act by its very terms is directed only at the seller. It does not declare that any contract which contains an exclusive dealing condition shall be unlawful. It says merely that it shall be unlawful for any person to make a sale or contract of sale (*not* a purchase or contract of purchase) upon such a condition. Thus it is quite different from such statutes as Section 1 of the Sherman Act[28] which declare that certain contracts are unlawful in themselves. It follows that under Section 3 it is only the act of the seller in entering into a contract of sale on the prohibited condition that is unlawful. We submit that under these circumstances, the seller has no right under Section 3 to repudiate a contract which the purchaser wishes to enforce. For he should not be permitted to take advantage of his own unlawful act to the detriment of the party the Act was designed to protect.

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28. 26 Stat. 209 (1890); 15 U.S.C. § 1.

A brief look at the legislative history of Section 3 will demonstrate the validity of this conclusion. It will be recalled that as originally drafted, and as approved by the House Committee on the Judiciary and the full House of Representatives, Section 3 provided that "any person • • • who shall • • • *make a sale of goods* • • • on the condition • • • that the • • • purchaser thereof shall not use • • • the goods • • • of a competitor or competitors of the • • • seller *shall be deemed guilty of a misdemeanor* and upon conviction thereof shall be punished by a fine • • • or by imprisonment • • •". See note 6, *supra*. Surely, if Section 3 had been enacted in this form, respondents could not be heard to contend that because of *their* commission of a crime, petitioner, innocent of any wrongdoing and a member of the very class for whose protection the statute was enacted, should be denied the right to enforce the instant contract against the guilty seller. The *only* reason that the criminal sanctions which Section 3 originally imposed on the seller alone were excised by the Senate Judiciary Committee, and the Act was redrafted to read "it shall be unlawful • • • to make a sale • • •," was "because it was thought best, especially in view of the experimental stage of this legislation, that the harshness of the criminal law should not be applied but that the enforcement of the Section should be given to the Federal Trade Commission." S. Rep. No. 698, 63rd Cong., 2d Sess., 43 (1914). Thus respondents are no more justified in invoking the present Section 3 as a basis for escaping their contractual obligations than they would have been if the Act, as finally adopted, had merely declared them guilty of a crime.

This was the conclusion reached by the United States Court of Appeals for the Seventh Circuit, in a recent case in which a seller sought to escape its contractual obli-

gations by pleading its own unlawful act under Section 3. Like the instant case, *Beloit Culligan Soft Water Service, Inc.* v. *Culligan, Inc.*, 274 F. 2d 29 (7th Cir. 1959), was an action by purchasers for a declaratory judgment that a contract (a dealership franchise agreement) which defendant had with each of the purchasers was legal and enforceable. The agreements required the buyers to purchase all their requirements of various water-softening products exclusively from defendant, and in a prior proceeding instituted by the Federal Trade Commission, a consent decree had been entered specifically prohibiting the *seller* from enforcing them, on the ground that they violated Section 3 of the Clayton Act. Thereafter the defendant seller notified the buyers that, as the contracts were unlawful, they would not be carried out.

The Court held that the contracts could be enforced by the purchasers, basing its decision on the alternative grounds that (1) the "requirements" provision could be excised from the contracts in accordance with a severability clause which they contained, and (2) the defendant could not "use this illegal provision as an excuse for avoiding its own contractual obligations" (274 F. 2d at 35). On this second point, the Court stated:

> "In enacting the Clayton Act, Congress had in mind the protection of dealers. The House Report stated the legislation was designed to prevent an unfair trade practice which was '• • • *unfair to the local dealer* and to the community • • •' (Emphasis supplied.)
>
> "Courts are reluctant to invoke the doctrine of *in pari delicto* where to do so would manifestly work an injustice. Allgair *v.* Glenmore Distilleries Co., D. C. S. D. N. Y., 91 F. Supp. 93.
>
> "Corbin, in his treatise on contracts (6 Corbin, Contracts, §1540 (1951)) states:

"'If a bargain is illegal, not because a performance promised under it is an illegal performance, but only because the party promising it is forbidden by statute or ordinance to do so, the prohibition is aimed at that party only and he is the only wrong doer. * * * The other party, being himself subject to no prohibition or penalty, may even be one of the class of persons for whose protection the prohibitory statute was enacted.

"'In these cases the refusal of all remedy against a party to the illegal bargain would penalize the very persons for whose benefit the making of such a bargain is prohibited or declared illegal. In such cases, in order to attain the purposes of the law, the courts have frequently enforced the bargain by one or more of the usual remedies, in favor of a party for whose benefit the law was intended and against a party toward whom the prohibition or penalty was directed. * * * There is no reason why, in a case otherwise proper, a decree for specific performance should not be granted.'

"We hold the case at bar is not one in which the defense of *in pari delicto* may be used to deny relief to the plaintiffs." (274 F. 2d at 35).

And so the Act has been consistently construed. As we have pointed out, in every case in which a contract has been held unlawful under the Clayton Act the judgment was directed solely against the seller and never against the purchaser. Indeed, except for the decision below, we know of no case in which a seller has been permitted to avoid its contractual obligations on the contention that it had unlawfully entered into a contract in violation of Section 3, and we submit that it would be a perversion of the purposes of the Act as well as of sound principles of justice to permit a seller to do so. As Mr. Justice Frankfurter stated in his dissent in *Federal Trade Commission*

v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, 402 (1953): "in the *Standard Oil* case we • • • pointed out that the retailers [i.e. purchasers] *might still insist on exclusive contracts if they wanted*" (Emphasis added).

Moreover, on several occasions this Court has made clear that it will not permit the avoidance of contractual obligations by judicially adding to the antitrust laws remedies not expressly authorized by Congress. Thus, in *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743 (1947), the Court refused to permit a buyer to escape payment of the purchase price of goods, on the ground that the seller had violated the Robinson-Patman Act by selling similar goods to others at a lower price. The Court reasoned:

> "The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. • • • This triple damage provision to redress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress.
>
> "It is contended that we should act judicially to add a sanction not provided by Congress by declaring the purchase price of goods uncollectible where the vendor has violated the Act. It may be admitted as argued that such a sanction would be an effective enforcement provision. Addressed to Congress, this argument might be persuasive, but the very fact that it would obviously be an effective sanction makes it even more significant that the Act made no provision for it; that no committee dealing with the Robinson-Patman Act proposed it; that not one word suggesting its consideration appears in the debates of Congress; no proponent of the Act pointed out in its favor that it would be self-enforcing because of this sanction; and no opponent pointed with alarm to the consequences of such a drastic sanction on the commerce of the nation." (330 U. S. at 750-51).

Similarly, specific remedies are provided for a violation of Section 3 of the Clayton Act, namely, a treble damage action[29] or suit for injunctive relief[30] by the injured party, and a proceeding by the United States[31] or Federal Trade Commission[32] for an injunction or cease and desist order. And there is not one word in the statute or in the relevant legislative history to support the theory that Congress intended Section 3 to be available to a *seller* as a basis for escaping its just contractual obligations; indeed, as we have seen, the opposite result is suggested.[33] To hold that a contract is unenforceable by the buyer if the seller establishes its own violation of Section 3 would be even more judicially inappropriate than to deny the seller the right to enforce payment of the purchase price in *Bruce's Juices*. As we have seen, in that case it was assumed that the plaintiff had violated the Robinson-Patman Act, while in the instant case petitioner, as the buyer, did not violate Section 3 by entering into the contract it now seeks to enforce.

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29. 38 Stat. 731 (1914); 15 U.S.C. § 15.
30. 38 Stat. 737 (1914); 15 U.S.C. § 26.
31. 38 Stat. 736 (1914); 15 U.S.C. § 25.
32. 38 Stat. 734 (1914); 15 U.S.C. § 21.
33. It may also be noted that at the time the Clayton Act was adopted, Congress had before it a bill which would have provided "that it shall be a complete defense to any suit arising out of any contract * * * that the plaintiff, * * * at the time of the making of such contract, or of its alleged breach, * * * or at the time of the beginning of said suit, was engaged in carrying on business in any manner or to any extent in violation of the provisions of this Act." S. 2552, 63rd Cong., 1st Sess. (1913); companion bill H. R. 54, 63rd Cong., 1st Sess. (1913). See Lockhart, *Violation of the Anti-trust Laws as a Defense in Civil Actions*, 31 Minn. L. Rev. 507, 510-11 (1947). That this bill was not incorporated into the Act but died in committee further indicates that Congress, in enacting the Clayton Act, did not intend that Section 3 be available as a broad defense in a contract action between private litigants.

Supplementing the mandate of *Bruce's Juices* is a series of cases in which this Court has enunciated the doctrine that "the federal courts should not be quick to create a policy of nonenforcement of contracts beyond that which is clearly the requirement of the Sherman Act." *Kelly* v. *Kosuga*, 358 U. S. 516, 519 (1959). Because "the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction" (358 U. S. at 519), this Court has permitted sellers guilty of violating that Act to collect the purchase price of goods[34], or even damages for refusal to accept goods at the purchase price[35], from buyers raising "the plea of illegality" (358 U. S. at 518). As this Court stated in *Kelly* v. *Kosuga* in words very pertinent to the case at bar:

> "If the defense of illegality is to be allowed as a collateral method of enforcement of the antitrust laws, as the breadth of the [buyer's] argument suggests, it must be said that his theory creates a very strange class of private attorneys general." (358 U. S. at 520).

To allow respondents to invoke Section 3 as a successful defense to this action would be directly inconsistent with the foregoing rulings that "the defense of illegality" should be narrowly confined to those cases where "the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act" (358 U. S. at 520). As we have seen, nothing in Section 3 makes enforcement of the instant contract by petitioner unlawful.

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34. *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165 (1915); *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540 (1902).

35. *Kelly* v. *Kosuga*, 358 U. S. 516 (1959); *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248 (1925). In these cases the plaintiffs, though wrongdoers, were permitted to enjoy the benefits of their (illegal) bargains by being awarded the difference between the contract price and the market price. See 358 U. S. at 518; 267 U. S. at 250, 252.

In conclusion, we respectfully submit that if this Court was unwilling to extend the express remedies of the Sherman and Robinson-Patman Acts so as to preclude sellers guilty of violating those Acts from asserting their full contractual remedies, it should not judicially supplement the Clayton Act to deprive a buyer *not* guilty of violating that Act of the same rights. Such a result would not only enable respondents to invoke their own wrongdoing as a basis for escaping their just contractual obligations, but would also cause a member of the class for whose benefit Section 3 was enacted to be penalized by the adoption of that statute.

CONCLUSION.

The judgment of the United States Court of Appeals for the Sixth Circuit should be reversed and the case remanded to the United States District Court for the Middle District of Tennessee, with directions to grant petitioner's cross-motion for summary judgment and deny respondents' motion for summary judgment.

Respectfully submitted,

WILLIAM C. CHANLER,
WINTHROP, STIMSON, PUTNAM & ROBERTS,
40 Wall Street,
New York 5, New York,
Attorney for Petitioner.

Of Counsel:
STEPHEN A. WEINER.

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